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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

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STATEMENT OF THE CASE.

Plaintiff in error, a citizen of the State of California, on June 25, 1920, filed her complaint and began the present action in the District Court of the District of Montana against the defendant in error, a citizen of the State of Montana, to recover judgment for Fifty-eight hundred dollars ($5800.00), besides interest at the Montana rate of eight per cent per annum, for moneys alleged to be due to her, and unpaid, from defendant in error (Trans. pp. 1-30). To this complaint the defendant in error on July 16, 1920, filed a general demurerr, but afterwards withdrew the same (Trans. p. 34), and on August 16, 1920, filed an answer (Trans. pp. 34-88). To test the sufficiency of this answer, the plaintiff in error on August 26, 1920, filed a demurrer to portions of it (Trans. pp. 88-99) on the grounds permitted by the state statute, i. e., insufficiency of facts to constitute a defense or counter-claim, and insufficiency in law on the face thereof, and at the same time filed a motion to strike out the same matters from the answer (Trans. pp. 100-111) as being frivolous, irrelevant and immaterial and as being insufficient in law to constitute a defense or counter-claim. The demurrer and motion were argued and submitted, and on October 20, 1920, were overruled and denied, the court handing down a written opinion (Trans. pp. 112, 113). Thereafter on November 19, 1920, plaintiff in error filed a reply to this answer (Trans. pp. 114-131). On January 3, 1921, defendant in error filed a motion for judgment on the

pleadings (Trans. pp, 132, 133), and plaintiff in error on January 6, 1921, filed a counter-motion for judgment on the pleadings in her behalf (Trans. p. 134). These two motions were argued and submitted, and on January 7, 1921, that of defendant in error was sustained and that of plaintiff in error denied, the court handing down a brief memorandum opinion. (Trans. p. 135). Judgment was thereupon rendered and entered in favor of defendant in error and against plaintiff in error (Trans. p. 136), and to review this action of the lower court the present writ of error is prosecuted.

The complaint is divided into ten counts or causes of action. They each set out a claim in favor of plaintiff against the defendant for Six hundred dollars ($600.00), being twelve monthly payments of Fifty dollars ($50.00) each with interest on the sum of the installments at eight per cent per annum from the end of each annual rest, viz: October, 14, 1911; and the like date for each succeeding year down to and including October 14, 1919, the tenth count being for Fifty dollars ($50.00) for each and every month from and after October 14, 1919, to the commencement of the action, a consideration of any one of the counts then, will suffice to grasp the case of plaintiff in error. We therefore condense for the use of this court one of the counts, e. g. the first, viz:

Paragraph I sets forth the jurisdictional prerequisites; II avers that plaintiff in error is the sister of one Mary M. Smith, who was and is the owner of two

certain town lots situated in Lewistown, Montana, on which there was and is a rooming house or hotel known as the Hoffman House; III avers that on March 14, 1910, said Mary M. Smith conveyed said premises by deed to the defendant in error, and that contemporaneously with the deed, and as a part of the same transaction, and for the purpose of evidencing the nature and intent of such transaction, the said parties made and executed a certain agreement in writing as follows:

> "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not to her heirs. Signed and sealed:
>
> Mary M. Smith
> Sadie Hoffman."

and it is further averred in said paragraph that the deed referred to in this agreement was intended to refer to the said deed from Mrs. Smith to Mrs. Hoffman; that the name therein, Mrs. J. A. McNaught, refers to the plaintiff in error; and that there was no other consideration for such deed than the carrying out by defendant in error of the conditions of such contract; that such papers were thereupon delivered;

that defendant in error in pursuance of the transaction, evidenced as above stated, entered into the possession and enjoyment of said premises, and still continues therein; that in pursuance of the said transaction defendant in error paid to plaintiff in error Fifty dollars ($50.00) a month down to October 14, 1910, but since then has failed and refused to make any further payments, although demand for such payments has often been made.

After filing and withdrawing a general demurrer to this complaint, and each of its ten counts, the defendant in error filed an answer, This answer admits the salient allegations of the complaint, but it contains much irrelevant matter, not constituting a defense, and hence the demurrer and motion to strike out portions of the same above referred to. This demurrer and motion were argued, and after the decision of the court thereon (Trans. p. 112-113) plaintiff in error filed her replication to all portions of the answer which in any wise might be considered a denial of the allegations of the complaint, thus raising an issue as to any new matter in the answer. All of the denials of the answer, however, must, we conceive, be considered as withdrawn and abandoned by reason of the motion for judgment on the pleadings of January 3, 1921, filed by defendant in error (Trans. pp. 132-133), the gist of which is:

> "The said contract or agreement between this defendant and Mary M. Smith, set out in plaintiff's complaint, and upon which the plaintiff

> bases her claim and right to recover the monthly payments of $50.00 each provided for in said contract, imposes no duty or obligation upon this defendant to make such payments, but whether she do so or not is optional with her, and the only remedy for defendant's failure to make such payment or payments is that provided for by the contract itself, and which remedy is exclusive, and of which only the other party to the contract, to-wit, Mary M. Smith, may avail herself,"

and the allegations of the complaint, and such explanatory matter as is contained in the replication must be deemed admitted. This motion of defendant in error left no recourse to plaintiff in error except a counter-motion for judgment in her favor on the pleadings as they stood by reason of the motion of defendant in error, and hence such motion of January 6, 1921 (Trans. p. 134). This latter motion being overruled and that of defendant in error sustained (See Opinion of Court, Trans. p. 135) judgment necessarily followed in favor of defendant in error, to review which this writ of error is directed.

SPECIFICATIONS OF ERROR.

1. The said District Court erred in overruling the demurrer of said plaintiff in error to the designated parts of the answer of defendant in error herein;

2. The said District Court erred in not sustaining the demurrer of said plaintiff in error to the designated parts of the answer of defendant in error herein;

3. The said District Court erred in overruling and denying the motion of said plaintiff in error to strike out the designated parts of the answer of defendant in error herein;

4. The said District Court erred in not sustaining the motion of said plaintiff in error to strike out the designated parts of the answer of defendant in error herein;

5. The said District Court erred in granting and sustaining the motion of defendant in error for judgment on the pleadings herein;

6. The said District Court erred in overruling and denying the counter-motion of plaintiff in error for judgment on the pleadings herein in her favor and against said defendant in error;,

7. The said District Court erred in ordering and entering judgment herein in favor of said defendant in error and against said plaintiff in error;

8. The said District Court erred in not ordering and entering judgment in favor of the plaintiff in error and against the defendant in error herein;

9. The said District Court erred in that the judgment ordered and entered herein in favor of said defendant in error and against said plaintiff in error is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts.

ARGUMENT.

The specifications of error Nos. 5, 6, 7, 8 and 9 involve the essential points that we desire to urge upon this court, indeed, they may be deemed summarized in that numbered 9, which we repeat, viz:

> "The said District Court erred in that the judgment ordered and entered herein in favor of said defendant in error and against said plaintiff in error is contrary to the admitted facts appearing on the pleadings herein, and is contrary to the law applicable to such facts."

which we now proceed to elaborate.

I.

The agreement (Trans. pp. 2-3) accompanying the deed, Exhibit A of the complaint (Trans. pp. 28-30), provides for the payment to plaintiff in error of Fifty dollars a month "for an unlimited time." It is admitted by the motion for judgment on the pleadings that that sum was actually paid by defendant in error to plaintiff in error for the seven months from March 14, 1910, to October 14, 1910, but that nothing has since then been paid. At the time this suit was filed, June 25, 1920, there were consequently 118 monthly payments past due and unpaid. Instead of setting up such 118 independent breaches, as separate and distinct causes of action, and asking for the appropriate interest from each breach, as might have been done, the complaint is subdivided into ten counts or causes of action, with yearly interest from the end

of each respective year. This method brings about a material diminution of the amount of interest plaintiff in error is clearly entitled to, but as the method pursued enures to the benefit of the defendant in error she cannot complain of it.

II.

The gist of the present controversy has been thoroughly threshed out in an action in the State courts between the parties to the said deed and the accompanying agreement, in which the grantor, Mary M. Smith, was plaintiff, and the grantee, Sadie Hoffman (defendant in error herein) was defendant. The plaintiff in error was not made a party to said action, but we do not think it out of place to advert to the fact that there was an express finding of fact therein that she knew of and consented to the bringing and maintenance of said action. The case referred to finally reached the Supreme Court of Montana and was there determined in an elaborate opinion in favor of plaintiff therein and against defendant in error herein, all the justices concurring. It is reported, Smith v. Hoffman, 56 Mont. 299, 184 Pac. 842. By that case it is decided that the said deed and the said agreement are valid, and under the Montana statute, Rev. Codes § 5031, which is as follows:

> "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together,"

are to be taken and construed together. The opinion in that regard, we cite from the syllabus, being:

> "*Held*, under section 5031, Revised Codes, that a deed made upon a condition subsequent imposed by a separate writing, under the terms of which the grantee obligated herself to make a stipulated monthly payment to a third person, with reversion in favor of the grantor, were part of and constituted the same transaction, regardless of whether they were executed at the same time or not."

See also Chicago etc. Co. v. Chicago T. & T. Co., 60 N. E. 586.

III.

The transaction, evidenced by the writings, for the benefit of plaintiff in error may be regarded as (1) a gift; as (2) a contract made for the benefit of a third person, viz, plaintiff in error; as (3) a trust wherein Mrs. Smith is trustor, the defendant in error, Mrs. Hoffman, is trustee, and Mrs. McNaught, plaintiff in error, is beneficiary, or *cestui que trust;* as (4) a conveyance on condition subsequent, which latter view the Supreme Court of Monatna adopts in its opinion in said case.

A gift is defined as a transfer of personal property (and a chose in action is personal property for "every kind of property that is not real is personal." Montana Rev. Codes § 4430), made voluntarily and without consideration (Montana Rev. Codes § 4635),

and cannot be revoked by the giver. (Montana Rev. Codes § 4637). Thus in Pullen v. Placer Co. Bank, 138 Cal. 169, 66 Pac. 740, Am. St. Rep. 19, it is held:

> "Where a party delivers a negotiable check on a bank to another, though he thereafter requests that it be not presented for payment till after his death, the payee gains such possession and control of the thing to be given as constitutes a completed and perfected gift."

And see 12 Ruling Case Law, Title: Gifts, Nos. 18, 19, 20, 23, 24, 27.

IV.

Montana Rev. Codes § 4970 provides:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

That such a contract, or agreement, as the one here presented cannot be rescinded without the consent of Mrs. McNaught, the plaintiff in error, is self-evident. It is an executed gift, a vested property right, and there is a constitutional inhibition against depriving a person of property without due process of law. It is not deemed necessary to more than further observe that a logical carrying out of a claim or right to rescind on the part of the trustor and trustee in derogation of the rights of a *cestui que trust* would abolish the whole law of trusts. As to the force and effect which are to be given to the transaction in ques-

tion the following quotation from Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. on page 656, construing the like California statute, will demonstrate, viz:

> "It does not lie in the mouth of defendant to say there is no privity, after it took the deeds signed by Stephens and Banta. The payment of the amount due plaintiff was clearly a part of the purchase money to be paid by defendant. It was nothing to defendant as to whom the purchase money should be paid. If its grantors requested the payment of $4,500 to plaintiff, and defendant agreed to pay said sum, it will not be allowed to defend this action upon the ground that its grantors did not owe plaintiff. It is not the business of the defendant to go upon a tour of investigation as to the merits of plaintiff's claim against its grantors after agreeing to pay it. If its grantors were satisfied that they owed plaintiff, defendant cannot, after agreeing to pay the said indebtedness, claim that nothing was due. It was said by the Supreme Court of Pennsylvania in Merriman v. Moore, 90 Pa. 81: 'A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it, according to such directions, he cannot set up a defense that his vendor was under no duty to

apply it in such manner.' See Warvelle on Vendors (2d Ed.) § 649; Dean, Use, etc., v. Walker, 107 Ill. 540, 47 Am. Rep. 467.

"It is provided in Civ. Code, § 1559: 'A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.' The agreement to pay plaintiff was made expressly for his benefit. It has never been rescinded. In such cases the rule is that the party for whose benefit the contract or promise is made may maintain an action against the promisor. Morgan v. Overman S. M. Co., 37 Cal. 537; Flint v. Cadenasso, 64 Cal. 83, 28 Pac. 62; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900; 31 L. R. A. 862, 52 Am. St. Rep. 88; Brewer v. Dyer, 7 Cush. 337. In the latter case the doctrine is thus clearly stated: 'Upon the principle of law long recognized and clearly established, that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement * * * that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the

promise and obligation on which the action is founded."

In the present case it is explicitly averred in the replication, e. g. in paragraph I, subdivision c, Transcript page 115, and is consequently admitted by the motion for judgment on the pleadings, that the obligations assumed by defendant in error under and in pursuance of the aforesaid transaction of March 14, 1910, between herself and Mrs. Mary M. Smith, were never waived, set aside, or rescinded by the parties thereto. It follows, then, that said section 4970 of the Montana Revised Codes is fully applicable in the present controversy.

Further, we call attention to the luminous opinion of Tweeddale v. Tweeddale (Wis.) 61 L. R. A. 509, 512, decided in 1903, for in that case some of the facts here presented are found. We quote a part of the decision in that case:

> "Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that

the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former, and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one or both of such parties can thereafter change the situation as regards the third person without his consent."

And see Grimes v. Barndollar (Colo.) 148 Pac. at page 261, together with the many cases there cited.

V.

That by the said deed, and the accompanying paper, a voluntary trust was created, we submit, is self-evident. The Montana statute, Rev. Codes § 5365, defines a voluntary trust as follows:

"A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another."

See also sections 5367, 5368, 5369, 5370, 5371.

And see:

Grant v. Bell, 58 Atl. 951 and cases cited.

Chadwick v. Chadwick, 59 Mich. 87; 26 N. W. 288.

"It requies no particular form of words to cre-

ate a trust. It will be inferred from the facts and circumstances of each particular case."

Chadwick v. Chadwick, 59 Mich 87.

See also

Padfield v. Padfield, 68 Ill. 210.
Freer v. Lake, 4 N. E. 512.
Cooper v. Whitney, 3 Hill, 96.

"No technical language is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of the trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement."

Colton v. Colton, 127 U. S. 300, 310.

And see

Taber v. Bailey (Cal.) 135 Pac. 975.

"The proof of the trust is not necessarily confined to any single writing, but may consist of several papers. Nor is it necessary, in such cases, that all of the writings be signed, provided they are so linked together in meaning as to be understood without the aid of parol evidence. It is not necessary that the writing re-

lied upon to prove the trust should be contemporaneous with the creation of the trust."

Jones on Evidence § 419, end of section.

Loring v. Palmer, 118 U. S. 321.

9 Pom. Eq. § 1007.

And in 1 Lewin on Trusts p. 130 (No. 1), it is said:

"Wherever a person, having the power of disposition over property manifests any intention with respect to it in favor of another party, the court * * * will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed."

A grant with a condition is viewed as a trust and is enforceable in equity.

1 Lewin Trusts p. 140 (No. 18).

And see the well reasoned case of Mills v. Davison (N. J.) 35 L. R. A. 113, 116.

Nor is a consideration necessary to uphold a trust.

Taber v. Bailey (Cal.) 135 Pac. 975, 978.

"The defendant cannot be permitted to retain possession as a trustee after repudiating his trust and claiming adversely. To permit such a course would be inequitable and an encouragement to fraud. By such a rule, the trustee could remain in possession by virtue of his office, and at the same time claim adversely until his claim ripened into a title under the statute of limitations."

Schlessinger v. Mallard, 70 Cal. 326.

and in Montana Rev. Codes § 5406, which is the same as Calif. C. Code § 2280, it is provided:

> "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

It is wholly immaterial what the transaction in question is called. Whether a trust, a gift in trust, a gift, a conveyance on condition subsequent, or a promise for the benefit of plaintiff in error, the foregoing authorities demonstrate, we submit, the right of plaintiff in error to recover for its breach, a conclusion, too, in accordance with common sense, which after all is the essence of the law, and with axiomatic principles which may not be violated with impunity. The defendant in error would possibly be in position to escape further liability to plaintiff in error by surrendering title to the property encumbered with the burden, but it is not shown that she has evinced any such intention. As long as she retains the property it self-evidently, we submit, must be with the burden her title thereto is charged with, Mont. Rev. Stat. § 6189, and she cannot take advantage of her own wrong. Ibid § 6185.

VI.

The learned judge of the lower court, judging from his memorandum opinion, in passing on the demurrer to and the motion to strike out certain portions of

the then answer of defendant in error, which answer must now be regarded as abandoned by reason of the motion for judgment on the pleadings (Memo. Op. Trans. pp. 112-113), and his subsequent opinion on sustaining said motion (Trans. p. 135), seemed to be of the opinion that the transaction in question constituted a conveyance on condition subsequent, and that the complaint of plaintiff in error is barren of facts sufficient to constitute a cause of action, cannot be amended, and that she, plaintiff in error, has no right capable of enforcement. This, of course, is the vital question for consideration and determination by this court. It is raised in Nos. 5, 6, 7, 8 and 9 of the Specifications of Error, *supra.*

By entering into the transaction of March 14, 1910, between Mrs. Mary Smith and defendant in error, and the execution of the papers in evidence of the same, viz, the said deed, Exhibit "A" of the complaint, from Mrs. Smith to the defendant in error, and the accompanying, contemporaneous written agreement between those ladies, which is set out *in haec verba, supra,* and which, as has been shown above, are to be taken, considered and construed as one instrument, it is clear that Mrs. Smith, the owner and grantor of the property set out in the deed, intended not only to confer an interest in the property on the defendant in error, but also to confer a substantial benefit, viz, Fifty dollars a month on her sister, the plaintiff in error. Both parties so understood the transaction, and by accepting the

deed, it is to be conclusively presumed, we submit, the grantee, defendant in error, agreed to the condition, and became as much bound morally and legally to pay during her retention of the premises the said Fifty dollars a month to Mrs. McNaught, plaintiff in error, as though she had entered into an express written obligation to that effect. Recognizing this obligation, the complaint alleges, and it is admitted that defendant in error paid the Fifty dollars a month until October 14th, 1910, thereby, if there were any ambiguity in the matter, placing a contemporaneous construction on the transaction, and what was intended by the parties thereby which is unescapable. What reason the defendant in error may have had for further non-performance on her part of this obligation is immaterial unless Mrs. McNaught, the plaintiff in error, consented to or acquiesced in it. This the plaintiff in error did not do, as is admitted, and, indeed, appears by the institution of the present action. The character of the transaction, its binding force and effect on the defendant in error appears further from the complaint in that it sets forth, Transcript page 3, lines 16-19,

> "that no other or further consideration for such deed passed or was given by the said defendant than the carrying out and fulfillment of the conditions of such agreement or contract."

and further in paragraph 3 on page 3 the papers

> "were delivered and the defendant in pursuance thereof entered into the possession and

enjoyment of said premises, and since then has continued and is now in such enjoyment and possession."

The Supreme Court of Montana in Smith vs. Hoffman *supra* did not decide, nor is it the law that the beneficiary mentioned in the transaction, Mrs. McNaught, the plaintiff in error, had no standing to enforce her rights in the event that she was deprived of them, and this is so whether a trust was created by the transaction in question, or whether the deed be regarded as a conveyance on condition subsequent, or in any other light, for certainly by the transaction in question a right was conferred on the plaintiff in error; she became entitled to it; a deprivation of such right constitutes a wrong, and it is axiomatic that "For every wrong there is a remedy," Montana Rev. Codes § 6191. Now, what is the remedy? We suggested, *supra*, that the transaction in question constituted a trust, and in that regard the quoted passage from *Colton vs. Colton*, 127 U. S. 300, 310, we submit, is unanswerable; and further, we suggested that a grant on condition is viewed and enforced as a trust. An elementary principle of the law is that the beneficiary of a trust may hold a recalcitrant trustee personally liable.

26 Ruling Case Law: Trusts § 215 and note 3 on p. 1350.

Oliver v. Piatt, 3 How. (U. S.) 396, 401.

Lathrop v. Bampton, 31 Cal. 23, s. c. 89 Am. Dec. 144-5

where the court says:

> "Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him, for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form, as we have already seen. If this cannot be done, the right of the *cestui que trust* to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the *cestui que trust* in the present case. When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is not better, but is identical with that of a simple contract creditor. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor, for the specific property covered by the trust is gone, and nothing is left to the *cestui que trust* except a naked claim for damages generally on account of the breach to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust."

And in the footnote 89 Am. Dec. p. 147 it is said:

"UPON BREACH OF TRUST BY TRUSTEE, CESTUI QUE TRUST MAY HOLD TRUSTEE PERSONALLY LIABLE or follow the property; Huckabee v. Billingsby, 50 Am. Dec. 183; Kaufman v. Crawford, 42 Id. 323;"

and Glendenning v. Slayton, 55 Mont. 587, where the syllabus reads:

"A bank which accepts a deposit of money in trust for the benefit of another, to be delivered to a third party upon the happening of a contingency, is bound to the highest good faith in executing the trust thus created; disposition of the deposit contrary to instructions renders the bank liable in damages either for a conversion, or in *assumpsit* for money had and received."

The reason for this rule is manifest, as without the capacity to enforce his rights it is easily conceivable that a beneficiary of a transaction, e. g. by connivance between trustor and trustee, would be without remedy, and that the rule applies in such cases as the present one is axiomatic, for, "When the reason is the same the rule is the same." Mont. Rev. Codes § 6179.

See Potter v. Lohsee, 31 Mont. on p. 96.

An illuminative case in this regard is that of Gall v. Gall, 5 L. R. A. (NS) 603, 605, which is cited and quoted from with approval in Smith v. Hoffman *supra.* In that case a conveyance on condition subsequent to support, the grantor being also the beneficiary of the condition, was under consideration, and it was held not only that such beneficiary had the right to sue

and recover at law for prior breaches of the condition, but also might sue to rescind because of subsequent breaches, such breaches constituting separate causes of action (p. 605). For ready reference we quote from the syllabus:

> "It is insisted, however, that the commencement of the action at law in December, 1901, to recover damages on account of failure to make payments annually as agreed prior to December, 1901, and the prosecution of such action to judgment by plaintiff, as well as the receipt by her of payments under the contract subsequent to December, 1901, amounted to an election of remedies by plaintiff; and that she could not thereafter maintain a suit in equity to rescind the contract. The action at law, commenced in December, 1901, was for prior breaches on account of failure to make annual payments in money and property as provided in the contract for the support and maintenance of the plaintiff. Such breaches constituted a separate cause of action. The action at law which went to judgment in favor of the plaintiff, and which was affirmed by this court (120 Wis. 270, 97 N. W. 938), covered breaches prior to the commencement thereof, and for such the plaintiff had the right to rescind or sue for damages. She had the same right of redress for subsequent breaches."

In a former part of this brief we said that the law is that by the acceptance of the deed with the con-

dition in question it is to be conclusively presumed that the defendant agreed to and became bound to fulfill the condition. We are surprised that this should be questioned, but, however that may be, we submit that the law is as stated by us. Thus in a leading work, 2 Devlin on Real Estate (3rd Ed.) section 940a, page 1758, it is said:

> "After acceptance of the deed by the grantee, and entry into possession of the land conveyed, he is bound as effectually by the conditions contained in the deed as though he had signed and executed the deed himself. He is deemed by such acts to have expressly agreed to do what it is stipulated in the deed that he shall do. Whether or not such an obligation is to be deemed, technically speaking, a covenant running with the land, it is, at all events, an agreement on the part of the grantee evidenced by his acceptance of the deed."

and in the same section on page 1759 it is said:

> "The acceptance of the deed constitutes a contract and all the covenants bind the grantee and his successors."

and further on pages 1759, 1760:

> "The acceptance of the deed implies an undertaking on the part of the grantee to perform the condition, and a subsequent grantee is equally bound. The acceptance of a deed poll makes it the mutual act of the parties. In some States the technical rule prevails that an agreement not

> sealed by the party charged with performance cannot create a covenant running with the land, but it is to be regarded as the personal agreement of the grantee. But if an action cannot be maintained on the deed, assumpsit will lie."

In support of these principles, so clearly announced, the author cites a wealth of modern authorities in footnotes appended to the text which it would smack of pedantry for us to review. It seems monstrous to us to claim that one may knowingly accept a conveyance founded on the sole consideration of paying a small sum of money to another, to endeavor to escape from such payment *while still retaining the benefit* of the conveyance. To sustain this contention, we submit, would violate at least two maxims of the law, viz: "He who takes the benefit, must bear the burden." Mont. Rev. Codes § 6189, and "No one can take advantage of his own wrong." Ibid § 6185.

Of course, the plaintiff in error, who is the one entitled to the benefit, is the "real party in interest" to enforce the right under Mont. Rev. Codes § 6477. And it cannot, we submit, be contended that whatever Mrs. Smith may have done, which might affect her rights can possibly prejudice Mrs. McNaught, unless she consented to or acquiesced therein, for again, a maxim of the law is applicable: "No one should suffer for the act of another," Mont. Rev. Codes § 6188, and this, we submit, is what the supreme court of Montana had in mind when it said in Smith v. Hoffman *supra*, on page 319:

"It would certainly be unjust to penalize defendant for the non-performance of that which the plaintiff herself had said she would excuse. Certainly, *so far as this action is concerned defendant had the right to rely on these statements.* (Italics ours).

and on the same page:

"The point is made that the letters, in order to be binding or cognizable at law or in equity, must be founded upon a consideration, or the promises or agreements therein must have been fully executed. This is not an action in damages. *Whether the letters release defendant from damages because of her failure to make the payments in question is not a matter to be passed upon here. In a proceeding involving that question, the effect of letters or promises not based upon a consideration might perhaps be considered.*" (Italics ours).

See in this connection Transcript page 115, subd. c.

It is submitted, "that tried both by the square of principle and the plumb line of authority" (6 Mont. 532) the complaint in the present action is not vulnerable to a general demurrer, and the opinions of the lower court in that regard are erroneous.

In its memorandum opinion the lower court attempted to align itself with the said case of Smith v. Hoffman, 56 Mont. 299, in holding that the said deed and contemporaneous agreement between Mary M.

Smith and defendant in error constitute a conveyance from the former to the latter on condition subsequent. In such memorandum opinion the lower court says: (Trans. p. 112, 113):

> "No intent to create a trust or gift in trust appears, for the payments to plaintiff are not charged upon the body or rents of the property involved, *and on the whole are optional with defendant.* No covenant is indicated beyond that implied from the language that, by defendant, "Not less than $50 per mo. be paid to" plaintiff "for an unlimited time and the deed will then stand good until" defendant's marriage or death, reversion to the grantor Smith or heirs. *Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit for damages or to compel payment by even Smith or heirs, much less by plaintiff.*
>
> "In such contingency defendant is only liable to divestiture of her estate in the property, if Smith or heirs elect to take advantage of defendants' breach, and re-enter upon the property.
>
> "The language of the agreement involved, crudely sets forth that the payments to plaintiff are of a condition subsequent. If made "the deed then will stand good." If not made, the deed will no longer "stand good," and the property reverts to Smith or heirs—*if they do not choose to re-*

enter, but waive the breach, plaintiff cannot take advantage of the breach, and all this is "horn book" law." (Italics ours).

We submit there is here contained a manifest misconception of the law. There can be no room for serious dispute that the acceptance of a deed on condition subsequent and the entering into possession of the granted premises thereunder by the grantee, all of which is admitted in the present case, raises a promise or undertaking on the part of the grantee to comply with the conditions, the fulfillment of which is not optional with the grantee but is binding on and enforceable against him. We have found, after a diligent research, no authorities to the contrary of this principle, and many in support of it. See authorities cited in this brief *supra.*

In a case from this circuit, United States v. Stanford, 69 Fed. 25, *loc. cit.* p. 38, in which the land grant from Congress to the Central Pacific R. R. Co. was considered, the court, Ross, Circuit Judge, said:

> "The terms and conditions of those grants are to be ascertained by resort to the statute. Having been duly accepted by the railroad companies in question, they constitute the contract between the respective parties, from which the companies cannot depart, and which the government cannot change or alter except in the mode reserved to it by law. If upon so elementary a proposition, authority is needed, it may be found in the decision

in the Sinking Fund Cases 99 U. S. 718, 719, and in Union Pac. R. C. v. U. S. 104 U. S. 662."

It should be observed that in this last cited case, which was one seeking to charge a *stockholder* of the accepting corporations for a proportionate amount of their debts to the United States, it was decided, on obvious grounds, that such *stockholder* was not liable for such debts, the above quoted passage being cited by us only as an opinion by one of the judges of this circuit on the point now under consideration.

In the much cited case of Hickey v. Lake S. & M. S. R. Co. (51 Ohio St.) 23 L. R. A. 396, a condition in a conveyance that the grantee should build and maintain fences on each side of the grantor's right of way was considered. The grantee subsequently conveyed the granted premises in divers parcels to sundry persons, who did not maintain the fences. The railway company did so build and maintain them, and for the cost thereof sued the grantee. The court said:

> "Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land,

is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and by express words, his heirs and assigns.

"In *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, it was held that a clause in a deed poll, to the effect that the grantee agrees for herself and for her heirs and assigns, that she and they would forever make and maintain a fence all around the granted premises, was of the same effect as an express covenant, signed and sealed by the grantee; that it would run with the land; that it created an incumbrance upon the land; and, by implication, it was recognized that a subsequent grantee would be liable to the original grantor in an action of assumpsit for nonperformance of the stipulation. A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 450.

"And, in *Georgia Southern Railroad v. Reeves*, 64 Ga. 492, the grantor in consideration of $25, and of the building of the railroad, conveyed to a company, its successors or assigns, forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of

the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction, of the rights, privileges, franchises, and property of the former. See also *Countryman v. Deck,* 13 Abb. N. C. 110."

In Sexauer v. Wilson, decided in 1907, 14 L. R. A. (N. S.) 185, 193, which involved the question of the *personal liability* of the grantee and his grantee for the non-performance of a condition subsequent to build and maintain a fence, a judgment against the grantor's grantee was held improper, but a judgment was ordered against such grantee's grantee. The court said:

"No question is made but that acceptance of the deed by the grantee obligated him to perform the conditions of the covenant. There is a sharp conflict in the decisions, but this court appears to be committed to the doctrine that, in accepting a deed poll containing covenants or conditions to be performed by him in consideration of the grant, he becomes bound for their performance. Peden v. Chicago, R. I. and P. R. Co. and Kennedy Bros. v. Iowa State Ins. Co. supra. And such is the voice of the great weight of authority. Hickey v. Lake Shore & M. S. R. Co. 23 L. R. A. 396, and note (51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672); Georgia Southern R. Co. v.

Reeves, 64 Ga. 492; Burbank v. Pillsbury, supra; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Maynard v. Moore, 76 N. C. 158; Midland R. Co. v. Fisher, supra; decisions collected in 11 Cyc. Law & Proc. p. 1045. The doctrine is an ancient one, being laid down in Sheppard's Touchstone, p. 117, as follows: "If feoffment or lease be made to two, * * * and there are divers covenants in the deed to be performed on the part of the feofees or lessees, and one of them doth not seal, * * * and he that doth not seal notwithstanding accept of the estate, and occupy the land conveyed or demised, in these cases, as touching all inherent covenants, * * * they are bound by these covenants as much as if they do seal the deed."

A particularly strong and apt case is that of Gall v. Gall, 126 Wis. 390, 5 L. R. A. (NS) 603, cited with approval in Smith v. Hoffman, 56 Mont. 315, and which constitutes one of the chief cases on which the Montana Supreme Court bases its reasons for this latter decision. In said case (Gall v. Gall) there was a conveyance on condition subsequent for the support, etc., of the grantor. The condition was broken whereupon the grantor began suit for the moneys then due on the condition subsequent and recovered judgment. Afterwards because of further breaches which occurred subsequent to the recovery of said judgment the grantor sued to rescind the contract and recovered judgment. It will be noticed that here the

plaintiff was both grantor and beneficiary in and under the deed. The judgment was affirmed. The syllabus reads:

> "Enforcement, by action, of benefits due under a contract by which property is conveyed in consideration of support, does not preclude, on the theory of election of remedies, an action to rescind the contract for subsequent breaches.
>
> "That at the time an action is brought for the benefits due under a contract for support in consideration of the conveyance of property, breaches exist subsequent to those included in the action; and that, after recovery, plaintiff accepts benefits which have so accrued, do not preclude an action, based on still later breaches, for a cancellation of the contract."

In the opinion it is said, page 605:

> "The conveyance of the premises in question by plaintiff to defendant Charles Gall, in consideration of support, maintenance, medical treatment, good care, and a home upon the premises conveyed, created an estate upon condition subsequent, subject to be defeated upon the nonperformance of such condition. Glocke v. Glocke, 113 Wis. 303, 57 L. R. A. 458, 89 N. W. 118. This doctrine is well established by the authorities, and not seriously disputed by counsel for appellant. It is insisted, however, that the commencement of the action at law in December,

1901, to recover damages on account of failure to make payments annually as agreed prior to December, 1901, and the prosecution of such action to judgment by plaintiff, as well as the receipt by her of payments under the contract subsequent to December, 1901, amounted to an election of remedies by plaintiff; and that she could not thereafter maintain a suit in equity to rescind the contract. The action at law, commenced in December, 1901, was for prior breaches on account of failure to make annual payments in money and property as provided in the contract for the support and maintenance of the plaintiff. Such breaches constituted a separate cause of action. *The action at law which went to judgment in favor of the plaintiff, and which was affirmed by this court* (120 *Wis.* 270, 97 *N. W.* 938), *covered breaches prior to the commencement thereof, and for such the plaintiff had the right to rescind or sue for damages. She had the same right of redress for subsequent breaches. The fact that she was compelled to sue for the recovery of annual installments falling due before December, 1901, affords no grounds for holding that for subsequent breaches she could not rescind.* The doctrine of election of remedies prohibits one from intentionally taking different and inconsistent positions to the detriment of his adversary. 2 Van Fleet, Former Adjudication, § 436. The subject has been often and fully discussed by this court." (Italics ours).

In Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765, 769, opinion by Brewer, Judge, it is said:

> "Still further we remark, that the acceptance of a deed which in terms provides that the grantee shall pay off a certain incumbrance, is an undertaking by the grantee to pay the incumbrance, and an undertaking which may be appropriated by the holder of the incumbrance, and upon which he may maintain an action. *Corbett v. Waterman*, 11 Iowa, 87; *Bowen v. Kurtz*, 37 id. 240; *Ross v. Kinnison*, 38 id. 397; *Lawrence v. Fox*, 20 N. Y. 268; *Thorp v. Keokuk Coal Co.* 48 Iowa, 253; *Burr, Admx. v. Beers*, 24 N. Y. 178. The rule is thus stated by the assistant vice-chancellor in *Blyer v. Monholland*, 2 Sandf. Ch. 478: 'The obligation is not enforced as being made by Monhollands to the complainant for the payment of Fitzrandolph's debt, but as a promise by M. to Fitzrandolph to pay him $2,500 by paying that sum to the complainant in discharge of his debt, which promise the complainant, as the mortgage-creditor of Fitzrandolph, is equitably entitled to lay hold of and enforce.' And the law courts have since then held that a legal action might be maintained by the holder of the security. *Lawrence v. Fox*, 20 N. Y. 268; *Anthony v. Herman*, 14 Kans. 494. Such an undertaking is a contract in writing, and the statute of limitations does not begin to run upon such a contract until the execution of the deed. Nor is it

material that this contract is not signed by the grantee. The acceptance of the deed makes it a contract in writing binding upon the grantee, just as the acceptance by a lessee of a lease in writing signed by only the lessor makes it a written contract binding upon such lessee; and suit can be instituted upon it, and the same rights maintained, as though it were also signed by the grantee."

Shover v. Myrick, 30 N. E. 207, is also an apt case. There a mother deeded to a daughter property on condition or agreement that the latter should support the former during life. The daughter died during the lifetime of the mother, and the latter's support was discontinued. She thereupon filed a claim for the value of such support against the deceased daughter's estate. It was allowed and the administrator appealed. In the opinion it is said:

"When the decedent entered into the agreement, and received from her mother the conveyance of the land, she accepted the terms thereof, including both that which was beneficial and that which was burdensome. Her contract to support and care for the appellee was a continuing one, and, upon a breach thereof, the latter had a right to recover full and final damages, including the entire expense for such support and care, not only to the time of the commencement of the action, but during the remainder of her life. Schnell v. Plumb, 55 N. Y. 592. This must be true whether the breach arose from some cause during

the life of the decedent, or because of her death. In the latter case the remedy is, of course, against her estate. The measure of damages for such breach is the value of the support and care from the time of the breach."

In Gardner v. Frederick (Wash. 1917) 165 Pac. 85, 86, the court said:

"The rule in this state, as well as the great weight of authority, is to the effect that, where an aged parent conveys property to a son or daughter, or other person, in consideration of future support and care, and there is a willful and wrongful withholding of such support and care, in equity the contract may be rescinded, or, if rescission cannot be had, an action for damages will lie. Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Gustin v. Crockett, 51 Wash. 67, 97 Pac. 1091; Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Patterson v. Patterson, 81 Iowa, 626, 47 N. W. 768; Bogie v. Bogie, 41 Wis. 209; Davis v. Davis, 135 Ga. 116, 69 S. E. 172; Carpenter v. Carpenter, 66 Hun (N. Y.) 177, 20 N. Y. Supp. 928; Shover, Administrator, et al, v. Myrick, 4 Ind. App. 7, 30 N. E. 207.

"In this case rescission could not be had because a portion of the land prior to the institution of the action had been sold and conveyed by the appellants to a third person. Under the authorities cited the action for damages could be maintained, if there was a willful and wrongful re-

fusal to provide the care and support contracted for, even though at the time the promise was made there was not then, in the minds of the appellants, an intention not to perform it."

In 11 Cyc. p. 1045 the rule is stated:

"The acceptance of a deed, whether poll or *inter partes*, containing a covenant on the part of the grantee is equivalent to an agreement on his part to perform the same, and it is immaterial that the deed is not signed by him. As to the nature of his liability, however, whether as upon an express covenant, or as upon an implied undertaking, the courts are utterly at variance."

In a footnote to 15 Annoted Cases on page 683 we find the following:

"By the acceptance by a grantee of a deed poll containing stipulation for the payment of money or the performance of any other act for the benefit of the grantor, a contractual obligation arises which is enforceable, at least between the parties. But as the grantee has not executed the deed, an action of covenant cannot, where the old forms of action prevail, be maintained for the breach or the non-performance of such contract.

England. Burnett v. Lynch, 5 B. & C. 589, 12 E. C. L. 327, *distinguishing* statement in Co. Litt, 231a. See also Lock v. Wright, 1 Stra. 571.

Canada. Credit Foncier France-Canadian v. Lawrie, 27 Ont. 498.

United States. See Willard v. Wood, 135 U. S. 309, 10 S. Ct. 831, 34 U. S. (L. ed.) 210, affirming 4 Mackey (D. C.) 538; Sanger v. Upton, 13 Nat. Bankr. Reg. 226.

Connecticut. Elting v. Clinton Mills Co. 36 Conn. 296; Foster v. Atwater, 42 Conn. 244.

See also Hinsdale v. Humphrey, 15 Conn. 431.

Maryland. See Stabler v. Cowman, 7 Gill & J. 284; Western Maryland R. Co. v. Orendorff, 37 Md. 334. See also State v. Humbird, 54 Md. 327.

Massachusetts. Pike v. Brown, 7 Cush. 133; Braman v. Dowse, 12 Cush. 227; Newell v. Hill, 2 Met. 180; Guild v. Leonard, 18 Pick 511; Goodwin v. Gilbert, 9 Mass. 510; Maine v. Cumston, 98 Mass. 317; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Kennedy v. Owen, 136 Mass. 199. See also Nugent v. Riley, 1 Met. 117, 35 Am. Dec. 355; Phelps v. Townsend, 8 Pick. 392; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335. *Compare* Fleming v. Cohen, 186 Mass. 323, 71 N. E. 563, wherein it is said: "A deed poll being given by one and accepted by the other was as effectual as if a formal indenture had been signed."

New Hampshire. See Emerson v. Mooney, 50 N. H. 315; Harriman v. Park, 55 N. H. 471; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633.

Oregon. Weaver v. Southern Oregon Co. 31 Ore. 14, 48 Pac. 171.

Pennsylvania. Maule v. Weaver, 7 Pa. St. 329, per Gibson J. See also Shoenberger v. Hay, 40 Pa. St. 132. *Compare* Louer v. Hummel, 21 21 Pa. St. 450, construing act of April 25, 1850; Kelly v. Nypano R. Co. 23 Pa. Co. Ct. 177.

Rhode Island. See Urquhart v. Brayton, 12 R. I. 169.

South Carolina. Giles v. Pratt, 2 Hill L. 439.

Vermont. Johnson v. Muzzy, 45 Vt. 419, 12 Am. Rep. 214. *Compare* Kellogg v. Robinson 6 Vt. 276, 27 Am. Dec. 550.

West Virginia. West Virginia, etc. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

Virginia. Vanmeter v. Vanmeter, 3 Gratt. 148."

In the present case the old technical rule that the action of covenant would not lie unless the defendant signed and sealed the deed does not apply, for here defendant in error did sign it by signing that part of it designated as the accompanying or contemporaneous agreement, and in Montana all distinctions between sealed and unsealed instruments are abolished. Mont. Rev. Codes § 5022, as in California (Cal. C. C. § 1629). The foregoing states the rule derivable from the acceptance, only, of a deed containing conditions or covenants, and *a fortiori* is this the case where the grantee signs the deed, or a part of it, as here. But

let us see whether in the present instance there is not an express agreement on the part of Mrs. Hoffman, the grantee, defendant in error, to pay the $50 in question.

In its memorandum opinion the lower court says:

> "The payments to plaintiff are not charged upon the body or rents of the property involved, *and on the whole are optional with defendant. No covenant is indicated beyond that implied from the language that by defendant not less than* $50 *per mo. be paid to plaintiff," etc.* (Italics ours).

This, too, we submit, is erroneous. It is a familiar, elementary rule of construction that all words in a contract must be considered; it must be read from its four corners. Further, "the intention of the parties is to be pursued if possible," and by Mont. Rev. Codes § 7877:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

Construed in Parham v. Chicago &c R. Co. 57 Mont. on page 502, and, as well said in this circuit by Sawyer, Judge, in Pratt v. California M. Co. 24 Fed. *loc. cit.* p. 872:

> "It is permissible for the court to take into

consideration the contemporaneous and subsequent action of these various parties in reference to this property, as evincing their construction and understanding of their respective rights and interests under this deed executed by Walsh to this association. *Mulford v. Le Franc*, 26 Cal. 88; *Steinbach v. Stewart*, 11 Wall. 576; *Hamm v. City of San Francisco*, 9 Sawy, 31; S. C. 17 Fed. Rep. 119."

And see

Helena &c Co. v. N. P. R. Co. 57 Mont. on page 106.

Blinn v. Hutterische Soc. &c (Mont.) 194 Pac. on page 142.

Now applying these rules, the pleadings and motion admit: That Mary M. Smith was the owner of the property referred to; that plaintiff in error was her sister; that she desired to make some provision for her; that a contract was entered into between her and defendant in error that no less than $50 per month was to be paid to such sister; that the conveyance from Mrs. Smith to defendant in error was voluntary, i. e. without other consideration than the carrying out of this arrangement; and that such payments were made by defendant in error until October 14, 1910. The $50 was to be paid by somebody. It clearly was not to be paid by Mrs. Smith, so whatever ambiguity exists, and we submit there is none, as to who was to make these payments is resolved by the action of

defendant in error herself in making the payments until October 14, 1910. Here, we submit, is a perfectly clear meeting of minds, and therefore, as it is admitted by the pleadings and motion, being founded on a valuable consideration, it should be given effect.

Another erroneous construction lurks in such memorandum opinion, viz:

> "Therein defendant does not covenant to pay in any event, but only to pay so long as she elects to hold the property secure from re-entry by Smith or heirs. If defendant fails to pay, she is not subject to suit for damages or to compel payment by even Smith or heirs, much less by plaintiff."

for

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Mont. Rev. Codes § 7875).

and we can find no warrant either in the agreement, or in the pleadings, or in the law, for this deduction of the lower court. Possibly, it should be remarked that we do not contend that the State statutes concerning construction of instruments control the Federal courts, we cite them for convenience sake, and be-

cause as has been well said "They constitute a perfect echo of the common law."

Having, then, a contract between Mrs. Smith and defendant in error for the benefit of plaintiff in error; one that had become executed insofar as its nature permitted of (See Lewis v. Lanebros (Mont.) 194 Pac. 152) it was irrevocable without the consent of plaintiff in error which the pleadings and motion admit and show was never given, so the only possible question remaining is whether plaintiff in error is the proper party to sue for its breach. This, we submit, must be answered in the affirmative both by reason of Mont. Rev. Codes § 6477 which provides that "every action must be prosecuted in the name of the real party in interest;" and Section 4970, which reads:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

And see 9 Cyc. pp. 378-385.

For these reasons, it is respectfully submitted that the judgment of the lower court is erroneous and wrong, and inasmuch as all the facts are admitted, that this court should render judgment in favor of plaintiff in error as prayed for in the complaint herein, or that it should order the lower court so to do.

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